No. 03-9877

In the Supreme Court of the United States

JON B. CUTTER, ET AL., PETITIONERS

v.

REGINALD WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

	Page
A. RLUIPA comports with the Establishment Clause	2
1. RLUIPA is a permissible accommodation of religion	2
a. RLUIPA accommodates, rather than favors, religion	3
b. RLUIPA balances competing interests	5
c. *Amos* confirms RLUIPA's constitutionality	8
2. The Establishment Clause applies equally to the Federal and state governments	9
a. Ohio's proposed historic distinction is ahistorical	9
b. Ohio's federalism argument has already been rejected	13
B. RLUIPA is a valid exercise of Congress's legislative authority under the Spending and Commerce Clauses	14
1. RLUIPA is proper legislation under Congress's spending power	14
2. RLUIPA is valid Commerce Clause legislation	18

TABLE OF AUTHORITIES

Cases:

Agostini v. *Felton*, 521 U.S. 203 (1997)	8, 10, 17
Alameen v. *Coughlin*, 892 F. Supp. 440 (E.D.N.Y. 1995)	7
Ashwander v. *Tennessee Valley Auth.*, 297 U.S. 288 (1936)	19
Bell v. *New Jersey*, 461 U.S. 773 (1983)	20
Benton v. *Maryland*, 395 U.S. 784 (1969)	13

Cases—Continued: Page

Blessing v. *Freestone*, 520 U.S. 329 (1997) 16
Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. *Grumet*, 512 U.S. 687 (1994) 4, 14
Board of Educ. v. *Mergens*, 496 U.S. 226 (1990) 9, 17
Borzych v. *Frank*, No. 04-C-632-C, 2005 WL 318820 (W.D. Wis. Feb. 8, 2005) 6
Brown v. *Board of Educ.*, 347 U.S. 483 (1954) 17
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 16
Charles v. *Frank*, 101 Fed. Appx. 635 (7th Cir. 2004) , cert. denied, 125 S. Ct. 479 (2004) 6
Charles v. *Verhagen*, 348 F.3d 601 (7th Cir. 2003) 6, 15
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 12
Corporation of Presiding Bishop v. *Amos*, 483 U.S. 327 (1987) 2, 8
Davis v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) 16
Employment Div., Dep't of Human Res. v. *Smith*, 494 U.S. 872 (1990) 3
Estate of Thornton v. *Caldor, Inc.*, 472 U.S. 703 (1985) 5
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 12
Franklin v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) 16
Harris v. *United States*, 536 U.S. 545 (2002) 6
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 19
Hoevenaar v. *Lazaroff*, 276 F. Supp. 2d 811 (S.D. Ohio 2003), rev'd on other grounds, 108 Fed. Appx. 250 (6th Cir. 2004), petition for cert. pending, No. 04-534 (filed Oct. 21, 2004) 7
Humphrey v. *Lane*, 728 N.E.2d 1039 (Ohio) 2
Johnson v. *California*, No. 03-636 (Feb. 23, 2005) 6, 15
Jones v. *United States*, 529 U.S. 848 (2000) 20
Lau v. *Nichols*, 414 U.S. 563 (1974) 15, 16
Lawson v. *Singletary*, 85 F.3d 502 (11th Cir. 1996) 6

Cases—Continued: Page

Lee v. *Weisman*, 505 U.S. 577 (1992) 4
Locke v. *Davey*, 540 U.S. 712 (2004) 2, 15
Luken v. *Brigano*, 797 N.E.2d 1047 (Ohio Ct. App. 2003) 7
Lynch v. *Donnelly*, 465 U.S. 668 (1984) 10
Malloy v. *Hogan*, 378 U.S. 1 (1964) 13, 14
Marria v. *Broaddus*, 200 F. Supp. 2d 280 (S.D.N.Y. 2002) 7
Missouri v. *Jenkins*, 515 U.S. 70 (1995) 17
Mitchell v. *Helms*, 530 U.S. 793 (2000) 10, 17
Morris v. *Debruyn*, No. 3:95-CV-227RP, 1996 WL 441860 (N.D. Ind. 1996) 6
NCAA v. *Smith*, 525 U.S. 459 (1999) 19
New York v. *United States*, 505 U.S. 144 (1992) 20
Oklahoma v. *Civil Serv. Comm'n*, 330 U.S. 127 (1947) 16
O'Lone v. *Estate of Shabazz*, 482 U.S. 342 (1987) 4
Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 16
Pierce County v. *Guillen*, 537 U.S. 129 (2003) 19
Sabri v. *United States*, 124 S. Ct. 1941 (2004) 15, 16
Salaam v. *Lockhart*, 905 F.2d 1168 (8th Cir. 1990), cert. denied, 498 U.S. 1026 (1991) 4
Turner v. *Safley*, 482 U.S. 78 (1987) 4
TWA, Inc. v. *Hardison*, 432 U.S. 63 (1977) 9
United States v. *Green*, 350 U.S. 415 (1956) 20
United States v. *Lopez*, 514 U.S. 549 (1995) 19
United States v. *Morrison*, 529 U.S. 598 (2000) 19
United States v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) 19
Wallace v. *Jaffree*, 472 U.S. 38 (1985) 3, 9
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970) 2
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 17
Zorach v. *Clauson*, 343 U.S. 306 (1952) 2

Constitution and statutes: Page

U.S. Const.:
Art. I:
Commerce Clause 18, 19, 20
Religion Clause 18
Spending Clause 17, 20
Amend. I 7, 9, 13
Establishment Clause ..... *passim*
Free Exercise Clause 1, 2, 10, 11, 13
Amend. X 18, 19
Amend. XIV 9, 10, 11, 12, 13
Equal Protection Clause 6
§ 5 ..... 10, 12, 13
Act of Feb. 2, 1813, ch. 17, 6 Stat. 116 3
Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* 16, 20
Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241:
Title VI, 42 U.S.C. 2000d 15, 16, 17, 20
Title VII, 42 U.S.C. 2000e *et seq.* 8, 9
42 U.S.C. 2000e 16
42 U.S.C. 2000e-2(a) 3
Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.* 16
Education Amendments of 1972, Title IX, 20 U.S.C. 1681(a) 16, 17, 20
Equal Access Act, 20 U.S.C. 4071 *et seq.* 9, 17
Hobbs Act, 18 U.S.C. 1951(a) 20
Individuals with Disabilities Education Act of 1990, 20 U.S.C. 1400 *et seq.* 17
National Prohibition Act, ch. 85, § 3, 41 Stat. 308-309 3
Rehabilitation Act of 1973, 29 U.S.C. 794 ..... 15, 16, 20
Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.* 1
42 U.S.C. 2000cc-1(b)(2) 18
42 U.S.C. 2000cc-1(g) 18

Statutes—Continued: Page

8 U.S.C. 1231(i) 15
42 U.S.C. 13710 15

Miscellaneous:

Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7775 (daily ed. July 27, 2000) 6
S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) 12, 13

In the Supreme Court of the United States

JON B. CUTTER, ET AL., PETITIONERS

v.

REGINALD WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, ET AL.

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

Ohio and their amici devote most of their briefing to asking this Court to disinter and adopt long-rejected arguments against full incorporation of the Establishment Clause, governmental power to accommodate religious exercise, and the federal government's ability to ensure that federally funded programs operate in accord with federal policy. Ohio's primary Establishment Clause argument (and the reasoning of the Sixth Circuit) would invalidate many longstanding legislative accommodations of religion, including those previously upheld by the Court, and render Ohio itself virtually powerless to accommodate religious exercise in prison. The States, like the federal government, retain the authority to accommodate religion within the "play in the joints" between what the Establishment Clause forbids and the Free Exercise Clause requires. But there is nothing about that area of operation that makes it uniquely immune from the normal rules of federalism. Once States choose voluntarily to accept federal funding or to engage in interstate commerce, Congress has the constitutional authority to act. And Ohio's contention that the heightened statutory standard of scrutiny prescribed by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, is unworkable in prisons is belied by the fact that Ohio (not to mention the United States government and nearly half of Ohio's state amici) has operated its prison system under that

same legal standard for years, as a matter of state law, without the security-imperiling consequences that Ohio's brief forecasts.[1]

A. RLUIPA Comports With The Establishment Clause

1. RLUIPA Is a Permissible Accommodation of Religion

Far from transgressing Establishment Clause bounds, RLUIPA's legislative accommodation of religious exercise "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). RLUIPA is consistent with the Establishment Clause because it alleviates, in a neutral and even-handed manner, only substantial and unjustified governmentally imposed burdens on religious exercise. Not one of Ohio's amici defends the Sixth Circuit's reasoning that RLUIPA violates the Establishment Clause because it accommodates only religious exercise. That is for good reason. This Court has specifically held that, in accommodating religious exercise, "'there is room for play in the joints' between" what the Free Exercise Clause mandates and the Establishment Clause proscribes, *Locke* v. *Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)), and such accommodations need not "come packaged with benefits to secular entities," *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987). As the States supporting Ohio presumably recognize, the Sixth Circuit's reasoning is not only inconsistent with a wealth of precedent, but also would sound the death knell for legitimate state efforts to accommodate religion and would call the validity of numerous state constitutional provisions and laws into question.

Ohio, for its part, does not dispute that RLUIPA has a permissible secular purpose. See U.S. Br. 10-14; see also

---

[1] See *Humphrey* v. *Lane*, 728 N.E.2d 1039, 1043 (Ohio) (applying strict scrutiny to prison guard's religious exercise claim); U.S. Br. 25 n.12.

Wallace v. *Jaffree*, 472 U.S. 38, 82-83 (1985) (O'Connor, J., concurring) (when government accommodates religion, purpose inquiry is not relevant). Ohio nevertheless embraces the Sixth Circuit's reasoning and argues (Br. 11-25) that RLUIPA has the primary effect of advancing religion. That argument ignores experience and precedent.

a. RLUIPA accommodates, rather than favors, religion

Ohio objects (Br. 12) that RLUIPA prefers "religion to irreligion," and that it "creates powerful incentives for religiosity" (Br. 15). But that is simply an argument against legislative accommodations of religious exercise, which by definition, accommodate *religious* exercise. Ohio's argument would indict virtually every accommodation of religious exercise ever enacted, from early efforts to exempt religious items from customs duties, see, *e.g.*, ch. 17, 6 Stat. 116 (1813) (plates for printing Bibles), to Prohibition's exemption for sacramental wine, ch. 85, § 3, 41 Stat. 308-309, to the early school release program upheld by this Court in *Zorach*, to Title VII's religious accommodation provision, 42 U.S.C. 2000e-2(a). The argument also defies this Court's invitation for legislative accommodations of religion in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872, 890 (1990):

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Accommodations of religious exercise alone are constitutionally permissible because they reflect a healthy "respect for, but not endorsement of, the fundamental values of others," and a sensitivity to the fact that "general rules can unnecessarily offend the religious conscience when they offend

the conscience of secular society not at all." *Lee* v. *Weisman*, 505 U.S. 577, 628 (1992) (Souter, J., concurring). "What makes accommodation permissible, even praiseworthy, is * * * that the government is accommodating a deeply held belief." *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

Ohio retreats to arguing (Br. 11-12) that government can "prefer 'religion to irreligion' * * * outside," but not within, prison walls because accommodations in prison entail a "dramatic enhancement of religious rights." But Ohio cannot mean what it says. First, that argument would require striking down the constitutions and laws of numerous States, including Ohio, see n.1, *supra*, because they apply the same compelling interest standard of protection for religious exercise—and only religious exercise—in prisons as RLUIPA.

Furthermore, under *Smith*, the enhanced protection of religious, as opposed to non-religious, rights effected by RLUIPA and parallel state laws is no more "dramatic" inside prison walls than outside. *Smith* held, with respect to the operation of neutral laws of general applicability, that the free exercise claims of free citizens merit no greater scrutiny than the claims of prisoners under *Turner* v. *Safley*, 482 U.S. 78 (1987), and *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987). See *Salaam* v. *Lockhart*, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990) (*Smith* "simply brings the free exercise rights of private citizens closer to those of prisoners"), cert. denied, 498 U.S. 1026 (1991). So if the gap between *Smith*/*Turner* review and RLUIPA's statutory standard renders RLUIPA unconstitutional, then the Court will also have to strike down the constitutions or laws of more than half the States. See U.S. Br. 15 n.6.

Third, Ohio's position renders religious accommodations unconstitutional precisely where they are needed most. The "unique dynamics" of the prison environment enhance,

rather than diminish, government's responsibility and power to accommodate religious exercise. That is why, long before RLUIPA, Ohio (like other States) provided its prisoners with chaplains and imams, but not with publicists or political consultants, accommodated religious dietary needs but not secular food preferences, and permitted prisoners to assemble for worship, but not for political rallies. See U.S. Br. 20 & n.8. True, "prisoners do virtually nothing 'on their own'" (Ohio Br. 24), but that reality heightens the need for accommodation. In prison, as in the military, government burdens that limit or preclude religious exercise are pervasive, and the government does not run afoul of the Establishment Clause by moderating some of those burdens.

Fourth, Ohio contends (Br. 15) that accommodations will fuel resentment and discord among prisoners. But Ohio fails to explain why RLUIPA would inspire that result when the States' parallel and pre-existing protections have not. The The federal Bureau of Prisons' experience is also to the contrary. Indeed, RLUIPA simply serves, in large part, to ensure that those faiths that are "not traditionally recognized by the Ohio Department of Rehabilitation and Corrections," Pet. App. B5, receive the same consideration that more established denominations have long received.

b. RLUIPA balances competing interests

Unlike the absolute protection of Sabbatarians struck down by this Court in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), RLUIPA imposes no inflexible command of accommodation. RLUIPA simply prescribes a well-recognized legal standard for ensuring that substantial, governmentally imposed burdens on religious exercise are warranted and non-discriminatory. At the same time, the RLUIPA standard respects compelling governmental interests in safety and security.

Ohio's contention (Br. 18-20) that RLUIPA unconstitutionally burdens third parties does not withstand scrutiny.

The district court found no factual basis for Ohio's assertion (Br. 18) that RLUIPA degrades prison security. Pet. App. B15. Prison security is a quintessential compelling interest, and Congress made clear that courts should apply RLUIPA's statutory standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with considerations of cost and limited resources." *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7775 (daily ed. July 27, 2000). Even under the Equal Protection Clause, "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" *Johnson* v. *California*, No. 03-636 (Feb. 23, 2005), slip op. 14. RLUIPA's statutory standard "is designed to take relevant differences into account," *id.* at 15, and thus "does not preclude the ability of prison officials to address the compelling interest in prison safety." *Id.* at 14.[2]

Virginia's assertion (Br. 14) that prisoners "have routinely invoked RLUIPA to thwart the States' anti-gang practices" is undercut by the very cases it cites. Virginia refers (*ibid.*) to one of the consolidated cases at hand (*Gerhardt*). But that suit was filed long before RLUIPA was enacted and initially

---

[2] Experience shows that courts have applied RLUIPA with sensitivity to the unique demands of prison security. See, *e.g.*, *Charles* v. *Verhagen*, 348 F.3d 601, 611 n.4 (7th Cir. 2003) (limiting frequency of prisoner assemblies); *Charles* v. *Frank*, 101 Fed. Appx. 635, 635 (7th Cir. 2004) (upholding prison's interest in combating gangs), cert. denied, 125 S. Ct. 479 (2004); *Borzych* v. *Frank*, No. 04-C-632-C, 2005 WL 318820, at *2 (W.D. Wis. Feb. 8, 2005) (same); see also *Lawson* v. *Singletary*, 85 F.3d 502, 504, 512 (11th Cir. 1996) (per curiam) (rejecting claim to racist religious texts); *Morris* v. *Debruyn*, No. 3:95-CV-227RP, 1996 WL 441860, at *9 (N.D. Ind. 1996). In any event, if the intersection of RLUIPA and prison security gives rise to constitutional concerns, courts should construe RLUIPA's statutory terms to comport with the Constitution's dictates, rather than declare the law facially invalid. *E.g.*, *Harris* v. *United States*, 536 U.S. 545, 555 (2002).

sought relief only under the Ohio Constitution and the First Amendment. It thus is hard to lay the blame for that litigation on RLUIPA.[3]

Ohio also argues (Br. 19) that compliance with RLUIPA is "time consuming." If true, that would be an appropriate reason for Ohio to decline the federal funding that triggered RLUIPA's application in this case. But it does not render RLUIPA an establishment of religion.

Finally, Ohio insists (Br. 19) that RLUIPA has had the effect of limiting the delivery of religious services to inmates. However, that untested factual assertion provides no basis for invalidating RLUIPA facially or as applied on Ohio's motion to dismiss. Indeed, it is not at all clear that what Ohio describes as a reduction in religious services is not, in actuality, simply a more equitable distribution of limited resources across *all* religious faiths, including those "not traditionally recognized by" Ohio, Pet. App. B5.[4]

---

[3] The other cases cited by Virginia and Ohio demonstrate the need for RLUIPA. See *Marria* v. *Broaddus*, 200 F. Supp. 2d 280, 295 (S.D.N.Y. 2002) (although prison officials refused on security grounds to allow one religious sect access to religious literature, they permitted a different religious group to have the same material); *Alameen* v. *Coughlin*, 892 F. Supp. 440, 442, 450 (E.D.N.Y. 1995) (striking down a complete ban on the possession of Muslim prayer beads, when prison regulations already permitted inmates "to wear only traditionally accepted religious medals, crucifixes, or crosses," and the prison's security objection was based on "unproven assumption[s]" and "pure speculation"); *Hoevenaar* v. *Lazaroff*, 276 F. Supp. 2d 811, 822-823 (S.D. Ohio 2003) (security objections to small patch of hair held to be "clearly illogical," and inconsistent with rules for female inmates and a 1991 prison regulation that allowed the warden to grant the same type of exemption), rev'd on other grounds, 108 Fed. Appx. 250 (6th Cir. 2004), petition for cert. pending, No. 04-534 (filed Oct. 21, 2004).

[4] Ohio's argument (Br. 20-21) that RLUIPA unconstitutionally entails inquiries into whether particular belief systems are "religions" and whether they are sincerely held overlooks that Ohio already has to make those identical assessments under the Ohio Constitution, see *Luken* v. *Brigano*, 797 N.E.2d 1047, 1050-1051 (Ohio Ct. App. 2003).

c. *Amos* confirms RLUIPA's constitutionality

Amos, *supra*, held that legislative accomodations of religion are permissible and need not "come packaged with benefits to secular entities," *id.* at 338. Ohio's efforts (Br. 22-24) to distinguish *Amos* fail.

First, Ohio argues that the exemption of religious organizations from Title VII's prohibition on religious discrimination in hiring simply left the religious claimants "where they were before Title VII" was enacted in 1964 (Br. 22). But the gravamen of Ohio's complaint is that RLUIPA impermissibly favors religion. Yet the Court upheld the accommodation in *Amos* even though it gave Title VII religious entities an exception not awarded to non-religious entities. More broadly, Ohio perceives a distinction between Title VII and RLUIPA only because it fails to consider prison regulations to be burdens on religious exercise that count for purposes of the constitutional analysis. Adjustments of prison regulations to allow religious exercise put prisoners in the same position they would have been but for the interfering prison regulation.

Second, Ohio argues (Br. 23) that *Amos* did not require affirmative action on the part of government officials and that "most religious-accommodation laws follow" that model. But the challenge in *Amos* was to the affirmative action of the government in exempting religious employers (in 1964) and extending that exemption (in 1972) to their non-religious activities. Beyond that, the extent to which an accommodation requires a single affirmative action or ongoing activity is often a function of context, and by itself makes no constitutional difference. Cf. *Agostini* v. *Felton*, 521 U.S. 203, 232-235 (1997) (dispensing with entanglement inquiry). Otherwise, the early release program upheld in *Zorach*, and all accommodations of religion in the military would have to be invalidated. And, whatever the model outside prisons, RLUIPA follows the model of all accommodations of relig-

ious exercise inside prisons—such as chaplaincy programs and dietary accommodations—which, due to the realities of prison life, entail ongoing governmental activity.

Third, Ohio argues that RLUIPA involves one government lifting a burden imposed by another. As applied to state prisons accepting federal funds, however, that is factually inaccurate. In all of RLUIPA's applications to State prisons, see U.S. Br. 28-29 & n.16, States agree to lift burdens they themselves have imposed on religious exercise as a condition of receiving federal funds. A State that accepts federal funds and then keeps its promise by lifting unjustified burdens on religious exercise engages in state, not federal, action. More broadly, Ohio never explains why which sovereign lifts the burden should make a difference under the Establishment Clause. If it did, then Title VII's religious accommodation provision would be unconstitutional, compare *TWA, Inc.* v. *Hardison*, 432 U.S. 63 (1977), and this Court must have erred in broadly upholding the Equal Access Act, 20 U.S.C. 4071 *et seq.*, against Establishment Clause challenge. *Board of Educ.* v. *Mergens*, 496 U.S. 226 (1990); *id.* at 260-262 (Kennedy, J., concurring).

2. The Establishment Clause Applies Equally To The Federal And State Governments

a. Ohio's proposed historic distinction is ahistorical

Twenty years ago, the Court recalled just how "firmly embedded in our constitutional jurisprudence" is the principle that the Fourteenth Amendment "impose[s] the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again." *Wallace*, 472 U.S. at 48, 49. Nonetheless, unable to square the Sixth Circuit's Establishment Clause ruling with either this Court's precedent or the Nation's long history of religious accommodation, Ohio and amicus Virginia ask this Court to partition

the Establishment Clause into roughly three "aspects." First, there is the so-called "libertarian" aspect of the Establishment Clause (Ohio Br. 10; Va. Br. 6), which would appear to correspond with the Establishment Clause as it has heretofore been understood, and which would provide individual rights and apply equally to the States and the federal government. Second, there is a heretofore unacknowledged federalism "aspect" of the Clause, which is said to protect States against federal encroachment with respect to either (i) the States' exercise of their "*Locke* power" to "act in the zone between the [Free Exercise and Establishment] clauses" (Ohio Br. 25), or even more ambitiously (ii) any "religious policy choices" made by States (Va. Br. 7). Finally, there is another barely adumbrated aspect of the Clause that is implicated when Congress exercises its Section 5 power (Ohio Br. 30; Va. Br. 13 n.10).

As an initial matter, Establishment Clause law, with its already "blurred, indistinct, and variable" lines, *Lynch* v. *Donnelly*, 465 U.S. 668, 679 (1984), is difficult enough to navigate without overlaying that jurisprudential trifecta. The labyrinthine network of new categories, limitations, and distinctions that Ohio posits would ensnare courts for decades in divining and defining the contours and content of those late-appearing sub-clauses, with no text or history to guide them.[5]

More importantly, Ohio and Virginia can point to no history that supports their argument. They cite statements to the effect that the Establishment Clause initially limited the power of the new federal government, not the States. But those statements, which predate the Fourteenth Amendment and incorporation, avail Ohio and Virginia not at all.

---

[5] For example, Ohio and Virginia offer no insights on which Establishment Clause will govern which aspects of ongoing joint federal-state programs like those at issue in *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality), and *Agostini* v. *Felton*, 521 U.S. 203 (1997)).

They also muster a few suggestions that the federal government has absolutely no power over religion, even with respect to purely federal matters, but no one embraces that sweeping argument. As to the multipartite rendition of the Establishment Clause that Ohio and Virginia actually embrace, however, they cannot identify anyone anywhere who ever said anything remotely similar to what they ask the Court to constitutionalize here, either at the time the Establishment Clause was enacted or at the time the Fourteenth Amendment was passed.

Ohio and Virginia emphasize that the Establishment Clause, as originally enacted, was designed in part to prevent the federal government from interfering with official state religious establishments. Ohio Br. 26-28; Va. Br. 9-12. That is beside the point. Accommodations of religious exercise are not state establishments of religion and were never treated as such historically, as Ohio itself admits (Br. 31 n.7). More importantly, by the time of the Fourteenth Amendment's enactment, there were no official state establishments left, and neither Ohio nor Virginia provides any historical evidence for arguing that the incorporated Establishment Clause was designed to perpetuate either that by-then anachronistic limitation on federal power or Ohio's multitiered sequel to it.

Quite the opposite, by the time the Fourteenth Amendment was enacted, the Establishment Clause was understood to be a guarantor of individual liberty, working in tandem with the Free Exercise Clause. See U.S. Br. 32-34 & n.20. And what history does show is that the Framers of the Fourteenth Amendment were distinctly concerned with the South's historic and enduring oppression and persecution of the religious exercise of slaves, freed slaves, and abolitionists. See U.S. Br. 34-35 & nn. 21-23. Given that record, the *last thing* the Reconstruction Congress would have left to the States is discretion to engage in the selective accommo-

dation of religious exercise—to adopt the "religious policy," for example, of exempting Southern churches from noise laws or zoning regulations but denying such exemptions to abolitionist Methodists or the churches of freed slaves.[6] Thus, with respect to incorporation of the Establishment Clause, Ohio's and Virginia's argument not only lacks any support in the historic record; it affirmatively defies it.

Ohio and Virginia ultimately settle on the position that, in the area between what the Establishment Clause proscribes and the Free Exercise Clause mandates, the States operate free not only from the commands of the Religion Clauses, but also from any regulation by the federal government. That position cannot be reconciled with this Court's decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). In *Boerne*, this Court held that Congress's power under Section 5 of the Fourteenth Amendment to enact prophylactic legislation enforcing the rights protected by Section 1 of the Amendment includes "enforcing the constitutional right to the free exercise of religion." *Id.* at 519. Section 5 thus specifically empowers Congress to "intrude[] into 'legislative spheres of autonomy previously reserved to the States,'" and to "prohibit[] conduct which is not itself unconstitutional." *Id.* at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)). Of course, a central mechanism for enforcing the free exercise of religion prophylactically or remedially would be to require more protection than the Free Exercise Clause itself compels—to step legislatively into that "play in the joints" between the Free Exercise and Establishment Clauses that Ohio and Virginia insist Congress may not enter.

---

[6] See S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 81 (1865) (noise regulations used to "suppress the religious meetings among the colored people"); *id.* at 85 (regulations authorizing only ordained ministers to preach and imposing a 10 p.m. curfew on meetings to suppress worship services of freed slaves); *id.* at 93 (zoning Negro churches out of town).

Ohio's and Virginia's only answer is to insist (Ohio Br. 30; Va. Br. 13 n.10) that there is some barely adumbrated third "aspect" of the Establishment Clause that allows for Congress's conceded power under the Reconstruction Amendments. But Ohio and Virginia never explain how it is that the Fourteenth Amendment's enforcement clause gave the federal government new power to intrude on the States' regulation of religion, while the substantive provisions of the same Amendment (which is what Congress enforces under Section 5) specifically reserved the States' authority vis-a-vis the federal government.

b. Ohio's federalism argument has already been rejected

While Ohio's vision of constitutional history is novel, its use of federalism principles to circumvent clearly established precedents incorporating the First Amendment is not. Quite the opposite, Ohio's position mirrors the arguments previously made by other States, not one of which succeeded. This Court has quite explicitly "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969) (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964)).[7]

Ohio identifies no sound basis for carving the Establishment Clause out for differential treatment. Ohio's emphasis on the Establishment Clause's original role in delimiting the reach of the federal government and concomitantly enhancing the authority and discretion of the States is no distinction at all. The same was said of the Free Speech Clause. See U.S. Br. 32. Likewise, a half century of this Court's Establishment Clause and First Amendment standing decisions

---

[7] See Resp. Br. at 7-16, *Malloy* v. *Hogan*, *supra* (No. 1031); *id.* at 16 ("[A]n essential value of federalism is imperilled when State and Federal standards are made from the same mold."); Resp. Br. at 10-16, *Benton* v. *Maryland*, *supra* (No. 201).

confirm that the Establishment Clause is, like other fully incorporated provisions of the Bill of Rights, a "personal right," *Malloy*, 378 U.S. at 10, that promotes individual liberty of conscience, rather than a structural entitlement of the States qua States. See, *e.g.*, *Kiryas Joel*, *supra*, (individual standing to challenge religious accommodation law); *Caldor*, *supra* (same).[8]

B. RLUIPA Is A Valid Exercise Of Congress's Legislative Authority Under The Spending And Commerce Clauses

1. RLUIPA is proper legislation under Congress's spending power

Ohio does not dispute that RLUIPA promotes the general welfare or that its conditions on the use of federal funds are unambiguous. See U.S. Br. 38-41. Ohio's sole distinct challenge to RLUIPA as spending legislation is that its terms do not sufficiently serve a *national* interest. Br. 38-39. That argument is incorrect as a matter of fact and law.

First, Ohio argues (Br. 38) that the funds that it receives are "wholly unrelated to RLUIPA's subject matter." That is wrong. Funds received by Ohio that "deal specifically with inmate rehabilitation," Pet. App. B13, directly implicate RLUIPA's mandate for the even-handed and scrutinized accommodation of inmate religious practices during their rehabilitation. See *id.* at B7. Other funds are for prisoner meals—an area of frequent requests for religious accommodation. *Ibid.*

In addition, Ohio receives funds that are targeted for "operational efforts," Pet. App. B7, and funds paid out under the State Criminal Alien Assistance Program, *ibid.*, which are unrestricted and may be used for *any* activity or purpose the

---

[8] Indeed, attempting to use federalism principles to resist full incorporation is a bit like using federalism principles to resist application of the Supremacy Clause. The incorporation doctrine is not about preserving federalism.

recipient chooses. 8 U.S.C. 1231(i); 42 U.S.C. 13710. Under those programs, federal funds reach all aspects of prison administration. RLUIPA vindicates Congress's programmatic interest in ensuring that none of those funds subsidizes religious discrimination or the imposition of unjustified burdens on religious exercise. Just as Congress has an interest in preventing the use of federal funds in any prison program in a manner that discriminates based on race, 42 U.S.C. 2000d (even though not all discrimination based on race is necessarily unconstitutional in the prison context, see *Johnson*, *supra*), or that fails to accommodate individuals' disabilities, 29 U.S.C. 794, Congress has an across-the-board interest in ensuring that federal funds not finance religious discrimination or put the federal government's weight behind policies that unjustifiably impair the ability of prisoners to exercise their faith. See *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974). Because it is helping to fund the program, the federal government has its own interest in how the "play in the joints," *Locke*, 540 U.S. at 718, is worked out.

In that respect, RLUIPA "follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is designed to guard against unfair bias and infringement on fundamental freedoms." *Charles* v. *Verhagen*, 348 F.3d at 607 (internal quotation marks omitted). And that distinct federal interest obtains regardless of whether the funds directly finance the proscribed operations, or whether they make it possible by freeing up funds from other operations, because money is fungible. *Sabri* v. *United States*, 124 S. Ct. 1941, 1946 (2004). Thus, Ohio's insistence (Br. 38) that "this is a case about Ohio's use of its *own*, non-federally generated, resources" is factually baseless and empirically unprovable. It is precisely because it is unknown and unknowable whose funds finance which particular accommodation decisions whether they be decisions about disability or religious accommodations—that

program-wide constraints on the use of federal funds fall within Congress's spending power. See *Lau, supra*; *Oklahoma* v. *Civil Serv. Comm'n*, 330 U.S. 127 (1947).

Second, Ohio contends (Br. 38-39) that RLUIPA impermissibly permits private enforcement as a remedy rather than the termination of federal funds. As an initial matter, targeting enforcement efforts at the individuals who have violated conditions on federal funding would seem a markedly less onerous form of enforcement than the rather draconian option of cutting off all federal funding. See *Sabri*, 124 S. Ct. at 1947-1948. In addition, funding termination operates only prospectively. It does nothing to hold funding recipients to the promises they made in obtaining and spending federal funds already received. Beyond that, private enforcement is a commonplace and constitutionally unproblematic feature of spending legislation, as underscored by the willingness of courts to infer private causes of action and damages remedies even when the statute does not expressly provide for them.[9]

Third, Ohio argues (Br. 39) that prisons are an area of state rather than federal concern. The operation of prisons is no doubt an important state task. But prisons are not islands of federalism, especially when operated with federal funding—Title VII, 42 U.S.C. 2000e; Title VI, 42 U.S.C. 2000d; Title IX, 20 U.S.C. 1681(a); the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. 794; the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*; and the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, all apply to state prison operations. See also *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) (applying the

---

[9] See, *e.g.*, *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Blessing* v. *Freestone*, 520 U.S. 329 (1997); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

Disabilities Act to state prisons despite noting the same language about the States' significant interest in prison administration relied on by Ohio (Br. 39)).

Moreover, Ohio's proposed "core function" limitation (Br. 39) on the spending power cannot be squared with this Court's precedent. "[E]ducation is perhaps the most important function of state and local governments," *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954), and "is primarily a concern of local authorities," *Missouri* v. *Jenkins*, 515 U.S. 70, 131 (1995); see also Va. Br. 22 (listing education as a core area of state sovereignty). But Title VI, Title IX, the Rehabilitation Act, the Individuals with Disabilities Education Act of 1990, 20 U.S.C. 1400 *et seq.*, the Equal Access Act, 20 U.S.C. 4071 *et seq.*, and the Spending Clause programs at issue in *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality), and *Agostini* v. *Felton*, 521 U.S. 203 (1997), all regulate the educational policies of the state and local governments. And the latter four have been upheld against Establishment Clause challenges, even though they implicate the religious policy choices of States in a core area of state and local concern. See *Mitchell*, *supra*; *Agostini*, *supra*; *Mergens*, *supra*; *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

Fourth, Ohio argues (Br. 40-41) that State control over religious policy choices is so foundational that States can never surrender their discretion in exchange for federal funding. That is an extraordinary proposition. If it were true, it would mean that Ohio has been consciously and flagrantly violating the Constitution and federal law by continuing to apply for and receive federal educational and prison funds for years based upon promises it knows it is constitutionally proscribed from keeping, including the application Ohio submitted just last month to the Bureau for Justice Assistance for $1 million in residential substance abuse treatment funding for state prisoners. Beyond that, it is an odd conception of federalism that envisions States knowingly making

promises to the *federal* government, taking *federal* funds based on those promises, and then turning around and asking *federal* courts to rescue them from their own voluntary and considered budgetary judgments.

But, in fact, neither the Religion Clauses nor the Tenth Amendment nor any combination of provisions exempts otherwise valid policies touching religion from the reach of Congress's spending authority. Ohio offers nothing other than *ipse dixit* to support its argument. If criminal defendants can waive all manner of statutory and constitutional rights, there is little basis in law, logic, or history to conclude that the Constitution would not trust sovereign States to exercise equivalent discretion.

2. RLUIPA is valid Commerce Clause legislation

In enacting RLUIPA, Congress also relied upon its Commerce Clause power, but it did so only in those cases where imposition or removal of the substantial burden on religion "would affect[] commerce with foreign nations, among the several States, or with Indian tribes," 42 U.S.C. 2000cc-1(b)(2), unless that effect on commerce, in the aggregate, would not be substantial, 42 U.S.C. 2000cc-1(g). No finding has been made that the Commerce Clause authority is implicated in this case, and there is substantial doubt that some of petitioners' claims (such as the right to assemble for worship or to depart from grooming regulations, Ohio Br. 6-7; Pet. App. B5) would trigger it. Indeed, the district court refused to address the issue because of unresolved factual and legal questions about "the relationship between the internal operation of state prisons and interstate commerce." Pet. App. B9. The court of appeals likewise did not reach the issue.

Ohio nevertheless argues (Br. 34) that it is "vital" for this Court to sustain the judgment below by rendering an advisory opinion on whether RLUIPA is proper Commerce Clause legislation, in order to avert "uncertainty and litigation [for] the States." What is more "vital," however, is for

this Court to adhere to more than two centuries of precedent recognizing that the Court lacks the constitutional power to render advisory opinions, see, *e.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.* (1792), and to equally hoary principles proscribing the issuance of even non-advisory constitutional decisions "unless absolutely necessary to a decision of the case," *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).[10]

In any event, Ohio's arguments are incorrect. Ohio identifies as an "insuperable obstacle" to sustaining RLUIPA a perceived flat prohibition on congressional regulation of non-economic activities. Br. 43 (citing *United States* v. *Morrison*, 529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995)). That objection might be insuperable *if* the Constitution actually contained such a proscription and *if* RLUIPA regulated exclusively non-economic activities. But neither is true.

This Court has never held that Congress's Commerce Clause power reaches only purely economic activities. In fact, *Lopez* eschewed the adoption of such "precise formulations," 514 U.S. at 567, and specifically noted that the inclusion of a jurisdictional element like RLUIPA contains "would ensure, through case-by-case inquiry," that a non-economic activity like simple firearm possession "affects interstate commerce." *Id.* at 561. *Morrison*, likewise, expressly declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity," 529 U.S. at 613, and again referred to the existence of a jurisdictional element like RLUIPA's as an equally relevant factor in as-

[10] See also *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001) (declining to reach Commerce Clause and Tenth Amendment arguments "[b]ecause the Court of Appeals did not address these claims"); accord *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003); *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

sessing the constitutionality of Commerce Clause legislation, *id.* at 611-612.[11]

Furthermore, even if such a flat proscription on regulating non-commercial activity existed, Ohio's facial challenge to RLUIPA would fail because many applications of RLUIPA regulate core economic activity like the operation of prison industries, the interstate purchase of literature, and the interstate provision of meals. U.S. Br. 46 & n.28.[12]

* * * * *

For the foregoing reasons and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

MARCH 2005

---

[11] Ohio attempts (Br. 45) to distinguish *United States* v. *Green*, 350 U.S. 415 (1956), which upheld as proper Commerce Clause legislation a similar jurisdictional element in the Hobbs Act, 18 U.S.C. 1951(a), on the ground that the Hobbs Act is directed against property crimes and that all property crimes are "economic activities." That argument is hard to reconcile with *Jones* v. *United States*, 529 U.S. 848 (2000), which expressed serious constitutional doubt that the arson of owner-occupied private residences amounts to economic activity reachable under the Commerce Clause. *Id.* at 857-858.

[12] Ohio's Tenth Amendment arguments (Br. 46-48) overlook that, because RLUIPA is valid Spending Clause and Commerce Clause legislation, its terms do not encroach upon any sovereignty interests retained by the States, *New York* v. *United States*, 505 U.S. 144, 156 (1992), and requiring Ohio "to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on [its] sovereignty," *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). Finally, RLUIPA no more "regulate[s] the way States regulate their prisons" (Ohio Br. 47) than the Rehabilitation Act, Title VI, Title IX, the Americans with Disabilities Act, or numerous other federal laws that apply to prison operations.